

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

ORIGINAL
76-1393

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 76-1393

PS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

LOUIS E. WOLFSON, ELKIN B. GERBERT,

Defendants,

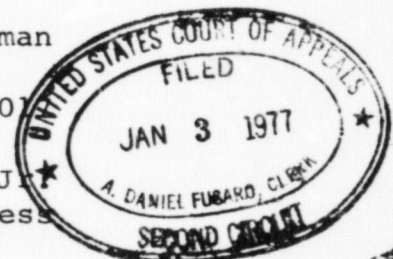
LOUIS E. WOLFSON,

Defendant-Appellant.

DEFENDANT-APPELLANT'S REPLY BRIEF

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 76-1393

United States of America,

Plaintiff-Appellee,

-against-

Louis E. Wolfson, Elkin B. Gerbert,

Defendants,

Louis E. Wolfson,

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DEFENDANT-APPELLANT'S REPLY BRIEF

I. Disqualification

1. There is no merit in the government's argument, Br., pp.18-21, that an affidavit and certificate of good faith are required in order to invoke the provisions of § 455. These technical, procedural requirements -- long-embodied in 28 U.S.C. 144 -- do not appear in recently amended § 455. Section 455 contains a straightforward disqualification requirement which is mandatory whenever and however it appears that the standards of the statute are met.

While the bill which became amended § 455 was in committee, the Department of Justice urged that "consideration should be given to adding a provision such as is embodied in 28 U.S.C. 144 to assure that applications for disqualification shall be timely made so as to prevent applications for disqualification from being filed near the end of a trial when the underlying facts were known long before." 1974 U.S. Code Congressional and Administrative News, p.6358. Congress rejected this suggestion and enacted the bill without any such procedural strictures.

The purpose of amended § 455 is "to promote public confidence in the impartiality of the judicial process." H.Rep. No. 93-1453, reprinted in 1974 U.S. Code Congressional and Administrative News at p.6353. The bill was enacted over opposition of the Judicial Conference. Id., pp.6359-61. If the judiciary were now to write procedural obstacles into the statute, the prophylactic purpose of promoting public confidence in the judicial process would be frustrated.

The government argues that the recent enactment of "Section 455 with its general standards cannot be read as an implicit repeal of the specific procedures of Section 144 where the two acts are not in direct conflict," citing principles of statutory construction.

Gov.Br., pp.20-21. However, Congress enacted § 455 as a broad, prophylactic measure and knowingly declined to encumber it with specific procedures like those of § 144. Thus, Congress did implicitly repeal the procedural provisions of § 144 insofar as they impose limitations upon the duty of a judge to disqualify himself whenever it appears that his impartiality might reasonably be questioned. Put differently, the procedural limitations of § 144 are in direct conflict with § 455, viewed in the light of its purposes and legislative history, and hence the recent, comprehensive enactment should be given precedence.

The government cites no authority which supports its contrary position. The only appellate decision cited is Davis v. Board of School Commissioners of Mobile County, 517 F.2d 1044 (5th Cir. 1975), which does not even discuss the necessity of an affidavit.

Equally unavailing are Samuel v. University of Pittsburgh, 395 F.Supp. 1275 (W.D. Pa. 1975), and Harley v. Oliver, 400 F.Supp. 105 (W.D. Ark. 1975), Gov.Br., p.21. In Samuel the court stated that a litigant "can file" a § 144 affidavit on a § 455 motion, 395 F.Supp. at 1277, not that he must file one. Indeed, while the plaintiff in Samuel filed an affidavit, it did not comply with the requirements of § 144, id., n.4, and the court neverthe-

less ruled upon the merits of the motion under § 455. Likewise, in Harley, while the court said an affidavit is required on a § 455 motion, 400 F.Supp. at 110, the court held that the allegations of the motion were insufficient to require disqualification, even if they had been put in the form of an affidavit, id. at 111. Thus, both cases stand for the proposition that the procedural requirements of § 144 need not be followed in order to obtain a ruling on the merits of a § 455 motion.

In any event, Wolfson's motion for recusal, App., p.146A, was based upon matters referred to in his verified petition which is equivalent to an affidavit.

2. Equally meritless is the argument that § 455 does not mandate disqualification when events occurring during litigation form the basis for doubting a judge's impartiality. Gov.Br., p.23. The policy underlying § 455 is one of assuring litigants and the public that judicial decisions are made without apparent or actual influence of personal animosity. It would make a mockery of this policy to hold that a judge, whose passions have been so aroused during litigation as to cloud his impartiality, is not subject to disqualification.

Indeed, this court in Wolfson v. Palmieri, 396 F.2d 121, 124-5 (2d Cir. 1968), applied the principle that "contacts during a trial might themselves have

created such a degree of irritation with a party or his lawyer as to create the bent of mind to which the Supreme Court referred in Berger [v. United States, 255 U.S. 22 (1921)]." The bent of mind referred to is one "that may prevent or impede impartiality of judgment." Berger v. United States, supra, 255 U.S. at 35.

United States v. Bernstein, 533 F.2d 775 (2d Cir. 1976), cited at Gov.Br., pp.23-23, supports Wolfson, not the government. Following the passage quoted by the government the court said:

"Of course such judicially acquired information or those natural preconceptions may lead a judge to feel a bias or prejudice that requires him to disqualify himself -- this was still, or at least until December 5, 1974, when new 28 U.S.C. § 455 was enacted, however, a matter for the individual judge subjectively to determine." 533 F.2d at 785. 1/

1/ This has been well recognized by other courts which have considered the question. In Davis v. Board of School Commissioners, supra, Gov.Br., p.22, the court adverted to the hornbook rule that the source of disqualifying bias or prejudice must be extra-judicial. 517 F.2d at 1051. But the court then said, "however, we think there is an exception where such pervasive bias and prejudice is shown by otherwise judicial conduct as would constitute bias against a party." Id. See also Reserve Mining Co. v. Lord, 529 F.2d 181 (8th Cir. 1976), where the appellate court ordered the district judge disqualified entirely on the basis of bias evinced in the conduct of the trial.

II. Fifth and Sixth Amendment

1. Brady issue. After the government's brief was submitted, Trial Exhibit 3504A was unsealed and made available to Wolfson's counsel by the United States Attorney. It appears that the government is correct in its assertions, Br., p.13, that the trial transcript is erroneous and that page 86 of the exhibit was in fact disclosed to Wolfson's trial counsel in 1967. We therefore withdraw the Brady argument.

2. Glickstein issue. The government misconceives the meaning of the Terkeltoub line of decisions. The decisions are not concerned with attorney-client privilege or the work product rule. Those principles have long been established as grounds for the refusal of an attorney to answer questions before a grand jury or in other settings.

The Terkeltoub decisions go further and hold that the Fifth and Sixth Amendments protect a criminal defendant from grand jury inquiry into the work of defense counsel, just as the Amendments protect him from surreptitious eavesdropping on defense preparations. 2/

2/ Even if the issue were whether Glickstein's appearance violated attorney-client privilege or the work-product rule, Wolfson would be entitled to a hearing and inspection of the grand jury minutes in order to deter-

It is true that there is no case in which violation of these rights has resulted in dismissal of an indictment or even in a new trial. Gov.Br., p.29. But that is only because, unlike here, defense counsel in the reported cases were sufficiently alert to raise the issue during the grand jury proceedings, ^{3/} or at the latest before trial. ^{4/} Where the issue was raised during the grand jury proceedings, the courts were in a position to and did protect the defendants' rights by ruling that counsel need not testify. Where the issue was raised before trial the courts responded either by suppression of evidence obtained from counsel, United States v. Mitchell, supra, or by conducting a searching hearing into whether the grand jury inquiry either covered the subject matter of the criminal case or chilled counsel's defense work, United States v. Colacurcio, supra.

Footnote continued.

mine whether such violations occurred. It is no answer to point to Glickstein's own statement "that he asserted the attorney-client privilege where appropriate. Gov.Br., p.29. The privilege belongs to Wolfson and he is entitled to determine whether Glickstein's testimony contains information which Wolfson imparted to him in confidence.

^{3/} In re Grand Jury Proceedings, 473 F.2d 840 (8th Cir. 1973); In re Terkel, 256 F.Supp. 683 (S.D.N.Y. 1966).

^{4/} United States v. Colacurcio, 499 F.2d 1401 (9th Cir. 1974); United States v. Mitchell, 372 F.Supp. 1239 (S.D.N.Y. 1973).

In the present case trial counsel were oblivious to the issue, and Wolfson's relief therefore cannot be the same as in the reported decisions. The case is, however, no different from other cases where this kind of issue surfaces after trial. Particularly apposite is Black v. United States, 385 U.S. 26 (1966), discussed in defendant's principal brief at page 49, n.28, involving post-trial discovery of pre-indictment eavesdropping on defense councils. There, even the government argued in favor of a remand for a hearing as to the uses to which the government had ~~put~~ the overheard information, a form of relief which was not accorded Wolfson below. The Court, however, rejected the government's argument, and ordered a new trial as a prophylactic measure. Wolfson is entitled to no less. 5/

5/ Wolfson learned of Glickstein's appearance before trial but, contrary to the government's argument, Br., p.29 (note), that does not mean that the issue is time-barred or waived. Wolfson certainly could not be expected to have ordered counsel to make a pretrial motion urging the illegality of their own actions which, they had assured him, were perfectly proper. See discussion in defendant's brief, pp.50-51. There is nothing to the contrary in United States v. Gurnes, 156 F.Supp. 467 (S. D.N.Y. 1957), aff'd 258 F.2d 530 (2d Cir. 1958), cert. denied 357 U.S. 939 (1959), Gov.Br., p.29 (note). There the court denied a post-conviction motion to dismiss the indictment based upon the defendant's involuntary testimony to the grand jury. Unlike here, counsel was well aware of the issue all along and, indeed, successfully objected to the use of the grand jury testimony at trial on Fifth Amendment grounds. The court held that the post-conviction motion based upon the same ground was barred.

At a minimum, there must be disclosure of the minutes of Glickstein's grand jury testimony and a hearing as to its role in the trial. United States v. Colacurcio, supra. The district court did not even look at the minutes or consider the import of the testimony, and the government has conspicuously failed to contend that no improper use was made of it at trial.

3. Gould issue. The government makes two arguments, both addressed to Wolfson's factual presentation on this issue: first, that Wolfson lacks evidence that Gould knew of the investigation and criminal reference report and, second, that Wolfson's evidence of the existence of the investigation and report is hearsay. Gov.Br., p.32. 6/

It is true that Wolfson cannot now prove that Gould knew of the investigation and criminal reference

6/ The government also contends that the petition did not allege that Gould knew of the report. Gov.Br. p.32. While the petition is not altogether specific about the point, App., 50A-51A, it is clear that knowledge was alleged. The petition charges that "fear motivated the behavior of [Wolfson's] attorneys." Id., 50A. It then elaborates by referring to the criminal reference report concerning Gould, id., 50A-51A, and concludes by stating that if Gould "was under immediate threat of indictment himself in another S.E.C. case, that would go a long way in explaining his failure effectively to defend petitioner." Id., 51A. These statements can only be read to charge that Gould knew of the threat and was therefore fearful and inhibited in his work.

report. Wolfson can only prove this through examination of Gould at a hearing, or on deposition, both of which were denied him by the district court. The function of the court is to make its processes available for trial of issues which are seriously tendered -- especially in criminal cases, and this is no less true in coram nobis than in other forms of proceeding. The interests of justice require that Wolfson's serious allegations concerning Gould be heard and put to rest, not swept aside on the ground that Wolfson lacks proof which is inherently unavailable to him without judicial process.

There is even less merit in the objection to the form of Wolfson's evidence concerning the existence of the investigation and report. The government has consistently chosen to invoke evidentiary technicalities on this point -- rather than to deny the allegation as it could easily do if the allegation were false -- and therefore one can only conclude that it is true.

In any event, Wolfson's evidence is not hearsay as the government argues. The allegation concerning the investigation and report is based upon a statement made to Wolfson's counsel by a Department of Justice attorney who worked on the Canadian Javelian investigation. Defendant's Br., p.21. Under the Federal Rules of Evidence a statement is not hearsay if it is offered

against a party and is "a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship." Rule 801(d)(2)(D). 7/

III. Alleged Failure of Counsel to Comply with Orders

The government cites no authority for the court's unprecedented action of dismissing the petition with prejudice on this ground. The only appellate decision cited is Segan v. Dreyfus Corp., 513 F.2d 695 (2d Cir. 1975), Gov.Br., p.36. The dismissal there affirmed was without prejudice. Moreover, the decision was based upon the legal insufficiency of the complaint, not upon failure to comply with orders.

Equally unavailing is the decision in Erie-Lackawanna Railroad Co. v. United States, 279 F.Supp. 316, 326 (S.D.N.Y. 1967) (three-judge court), aff'd sub

7/ The government properly does not emphasize the fact that counsel is understandably reluctant to identify his confidential informant unnecessarily. The real issue is the extent of Gould's knowledge, and that issue will be resolved only through examination of Gould at or before the hearing. Wolfson relies on the informant's statement primarily to establish a basis for a hearing or discovery on the crucial issue of Gould's knowledge. Once that issue is settled, it will be unnecessary to rely on the statements of the Department of Justice attorney as a basis for requesting relief.

nom Penn Central Merger Cases, 389 U.S. 486 (1968), Gov.Br., p.36. The district court ordered two of the plaintiffs, Shapp and Scranton, to file supplemental complaints, which they declined to do because they preferred to press their claims in another proceeding in the Middle District of Pennsylvania. 389 U.S. at 502. "After several warnings," id., the Southern District dismissed their complaints with prejudice. Although the dismissal was granted upon the government's motion based upon "want of prosecution", 279 F.Supp. at 326, the court rested its action upon two other grounds. First, it said the plaintiffs' "case therefore falls within the ordinary rule that the claim of a litigant who refuses to file an amended or supplemental complaint or to comply with other lawful procedural orders of the court will be dismissed with prejudice." 279 F.Supp. at 326. Second, it held that the complaints lacked merit. Id., n.6. The court cited no authority for its assertion that there is an "ordinary rule" of dismissing complaints with prejudice for failure to comply with procedural orders. The Supreme Court affirmed the dismissals on alternative grounds of "failure to prosecute" and the "lack of merit of their claims." 389 U.S. at 505. Thus the Court did not accept the district court's "ordinary rule." In any event, even if dismissal with

prejudice were the ordinary rule where "several warnings" have been issued, the rule would not support the instant dismissal without warning and without an attempt to employ lesser sanctions, particularly in view of counsel's substantial compliance with the judge's requests.

CONCLUSION

For the reasons stated above and in Defendant-Appellant's Brief the court should reverse the orders of the district court and remand for proceedings before a different district judge with instructions to vacate the judgment of conviction and dismiss the indictment.

Respectfully Submitted,

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